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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 1228

W. R. GRIMSHAW COMPANY,
Petitioner,

v.

MARTIN WRIGHT ELECTRIC COMPANY,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTE 3

STATEMENT OF THE CASE 3

I. BACKGROUND OF THE DISPUTE 3

II. STATEMENT OF FACTS 4

Pertinent Provisions of Contract of Indemnity 5

Stipulations and Admissions 6

Photographs and Testimony 7

III. THE DECISION OF THE DISTRICT COURT 11

IV. THE DECISION OF THE COURT BELOW 15

REASONS FOR GRANTING THE WRIT AND SUMMARY OF ARGUMENT 16

Point I — The Court of Appeals, in bottoming its decision on a Texas Civil Appeals case which is clearly distinguishable on its facts, and in disregarding the applicable Texas law, violates the Rule of Decision Act, 28 U.S.C.A. Sec. 1652, and the Erie doctrine of this Court 16

Point II — The holding and opinion of the Court of Appeals is contrary to and in conflict with its prior holdings on the subject matter in issue 22

Point III — This being a Summary Judgment proceeding, if the Court cannot hold as a matter of law that Wright under its sub-contract with Grimshaw was required to furnish its own lighting for its own employees on the occasion in question, then a fact issue on such matter existed, and the Court of Appeals in rendering Summary Judgment against petitioner denied petitioner due process and the equal protection of the laws by denying it a trial on a material issue of fact, and this cause should be reversed and remanded 25

Page

CONCLUSION 27

Appendix A — Title 2, United States Code, Sec. 1652. State Laws as Rules of Decision A1

Appendix B — Opinion of the Court Below, dated October 16, 1969 ..... A2-A16

Appendix C — Judgment of the Court Below, dated October 16, 1969 ..... A17

Appendix D — Order of the Court Below on Petition for Rehearing and Petition for Rehearing En Banc, dated November 26, 1969 ..... A18

Appendix E — Opinion of the District Court, dated April 22, 1968 ..... A19-A26

Appendix F — Judgment of the District Court, dated April 18, 1968 ..... A27-A29

AUTHORITIES CITED

Cases:

Alamo Lumber Company v. Warren Petroleum Corporation, 316 F. 2d 287 (5th Cir. 1963) 15, 22, 23

American Agricultural Chemical Company v. Tampa Armature Works, 315 F. 2d 856 (5th Cir. 1963) 22, 23, 24

Brown & Root v. Service Painting Company of Beaumont, 437 S.W. 2d 630 (Tex.Civ.App., March, 1969, error ref.) 16, 17, 18, 19, 22, 23

Commissioner of Internal Revenue v. Stern, 78 S.Ct. 1047, 357 U.S. 39, 2 L.Ed. 2d 1126 16

Crews Well Service v. Texas Company, 358 S.W. 2d 171 (Tex.Civ.App. 1962, writ ref. n.r.e. 360 S.W. 2d 873) 21

Erie Railroad Company v. Tompkins (1938) 304 U.S. 64, 58 S.Ct. 816 ..... 2, 16, 22

Fidelity Union Trust Company v. Field, 61 S.Ct. 176, 311 U.S. 169, 85 L.Ed. 109 16

Cases (Cont'd): Page

Foster v. Carle, 160 S.W. 2d 999 (Tex.Civ.App. 1942, writ ref. want of merit) 13

Guaranty Trust Co. of N. Y. v. York, 65 S.Ct. 1464, 326 U.S. 99 17

Gulf, Colorado & Santa Fe Railway Company v. McBride, 322 S.W. 2d 492 (Tex.Sup.Ct. 1959) 20

Gulf Oil Corporation v. Spence and Howe Construction Co., 365 S.W. 2d 631 (Tex.Sup.Ct. 1963) 20, 21

Grimshaw v. Zoller, 396 S.W. 2d 477 (Tex.Civ.App. 1965) 12

Hartford Acc. & Ind. Co. v. Cardillo, 112 F. 2d 11 (D.C. Cir. 1940) 13

Houston & T.C.R. Co. v. Diamond Press Brick Co., 222 S.W. 204 (Tex.Sup.Ct. 1920) 14, 20

Jacksonville Terminal Co. v. Railway Express Agency, Inc., 296 F. 2d 256 (5th Cir. 1962) Cert. Den. 369 U.S. 860, 82 S.Ct. 949, 8 L.Ed. 2d 18 ..... 22, 24

James Stewart & Co. v. H. B. Mobley, 282 S.W. 2d 290 (Tex.Civ.App. 1955, writ ref'd) 20

King v. Order of United Commercial Travelers of America, 68 S.Ct. 488, 333 U.S. 153, 92 L.Ed. 608 16

Mitchell's, Inc. v. Friedman, 303 S.W. 2d 775 (Tex.Sup.Ct. 1957) 14, 20

Monical and Powell, Inc. v. Bechtel Corp., 404 S.W. 2d 911 (Tex.Civ.App. 1966, writ ref. n.r.e.) 21

Poller v. Columbia Broadcasting System, (1962) 82 S.Ct. 486, 368 U.S. 464 26

Red Ball Motor Freight, Inc. v. Employer's Mutual Liability Insurance Co., 189 F. 2d 374 (5th Cir. 1951) 13, 25

Sartor v. Arkansas Natural Gas Corporation, (1944) 64 S.Ct. 724, 321 U.S. 620 26

Cases (Cont'd):

Page

Smith v. Ohio Oil Co., 365 S.W. 2d 621 (Tex.Sup.Ct. 1963) 14, 20, 21

Turner Construction Co. v. The Belmont Iron Works, 158 F. Supp. 309 (E.D. Penn. 1957) 13

West v. American Telephone & Telegraph Company, 61 S.Ct. 179, 311 U.S. 223, 85 L.Ed. 139 16

Westinghouse Electric Corporation v. Childs-Bellows, 352 S.W. 2d 806 (Tex.Civ.App. 1961, error ref.) 17, 18, 19, 22, 23

Statutes:

Judicial Code:

28, U.S.C.A. Sec. 1254 (1) 2

28, U.S.C.A. Sec. 1332 (a) (1) 3

28, U.S.C.A. Sec. 1652 ..... 2, 3, 16, 22

Rules and Treatises:

24 ALR 2d 330, Sec. 2 14

76 ALR 2d 1228, S5 13

30 Am. Jur. 475, Sec. 421 14

Rule 56 (c) Fed. Rules Civ. Proc. 27

IN THE

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OCTOBER TERM, 1969

NO.

W. R. GRIMSHAW COMPANY,

Petitioner,

v.

MARTIN WRIGHT ELECTRIC COMPANY,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, W. R. Grimshaw Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled cause on October 16, 1969, petition for rehearing and petition for rehearing En Banc denied on November 26, 1969. (For brevity petitioner, W. R. Grimshaw Company, will hereinafter be referred to as "Grimshaw" and respondent, Martin Wright Electric Company, as "Wright".)

OPINIONS BELOW

The opinion of the District Court is printed in the Record (R. 301-311) and in Appendix E, infra, page A 19, and is re-

ported in 283 F. Supp. 628. The judgment of the District Court is printed in the Record (R. 311-313) and in Appendix F, infra, page A 27. The opinion of the Court of Appeals is yet unpublished but is printed in Appendix B, infra, page A 2. The judgment of the Court of Appeals is printed in Appendix C, infra, page A 17. The order of the Court of Appeals on Petition for Rehearing and Petition for Rehearing En Banc is printed in Appendix D, infra, page A 18.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on October 16, 1969. By order dated November 26, 1969, the Court of Appeals denied Petitioner's Petition for Rehearing and Petition for Rehearing En Banc. The jurisdiction of this Court is invoked under section 1254(1) of the Judicial Code, 28 U.S.C.A. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the holding and opinion of the Court of Appeals is contrary to the dictates of 28 U.S.C.A. Sec. 1652, and the holding of this Court in *Erie Railroad Company vs. Tompkins* (1938) 304 U.S. 64, 58 S.Ct. 816, in refusing to apply the applicable Texas law to the facts and indemnity contract in question?

2. Whether the holding and opinion of the Court of Appeals is contrary to and in conflict with its prior holdings where similar fact situations and indemnity agreements were involved?

3. Since this was a Summary Judgment Proceeding, if the Court cannot hold as a matter of law that Wright under its Sub-contract with Grimshaw was required to furnish its own lighting for its own employees in carrying out such Sub-

contract, then did not a fact issue exist on such matter, and has not the Court of Appeals in rendering Summary Judgment against petitioner denied petitioner due process and the equal protection of the laws by denying it a trial on such material issue?

STATUTE

The statutory provision involved is Section 1652 of Title 28, United States Code, 28 U.S.C.A. Sec. 1652. It is printed in Appendix A, infra, page A1.

STATEMENT OF THE CASE

I.

BACKGROUND OF THE DISPUTE

This case is a suit seeking recovery of $120,934.16, plus interest thereon at 6% per annum from April 28, 1966, alleged to be due and owing pursuant to a written contract of indemnity. Petitioner Grimshaw, brought this suit in the United States District Court for the Western District of Texas, San Antonio Division, which had jurisdiction under section 1332 (a)(1) of the Judicial Code, 28 U.S.C.A. Sec. 1332 (a)(1), because of diversity of citizenship and amount in controversy. This suit was brought by petitioner, W. R. Grimshaw Company, an Oklahoma corporation, as plaintiff and herein referred to as "Grimshaw", against respondent, Martin Wright Electric Company, a Texas corporation, as defendant herein referred to as "Wright", seeking recovery under a written contract of indemnity for certain loss, expense and damages that Grimshaw had incurred and paid out by reason of injuries and death of one Elmore C. Zoller, deceased, herein referred to as "Zoller", an employee of respondent, Wright. Grimshaw is sometimes referred to as "Contractor" and Wright is some-

times referred to as "Sub-Contractor" and the parties herein may sometimes be referred to as "plaintiff" and "defendant" as in the trial court. Where emphasis has been added it will have been added by counsel unless otherwise designated.

There being no dispute as to the underlying facts, both parties moved for summary judgment upon the pleadings, admissions, stipulations, sworn testimony of Wright's president and several of its employees, and upon the contract agreement itself. The District Court concluded that there was no genuine issue as to any material fact and granted Grimshaw's Motion for Summary Judgment and denied the cross-motion for summary judgment of Wright, and entered judgment for Grimshaw on April 22, 1968, for the sum of $135,247.45, plus interest and costs. (Appendix F, infra; R. 311-313). The District Court on the same date filed an opinion upon which such judgment was predicated (Appendix E, infra; R. 301-311, and reported 283 F. Supp. 628). Respondent, Wright, appealed from the foregoing judgment to the Court of Appeals, which reversed the judgment of the District Court and rendered judgment granting respondent's cross-motion for summary judgment and dismissing the action. (Appendix B and C, infra).

II.
STATEMENT OF FACTS

On October 18, 1960, Grimshaw entered into a contract as general contractor to build Wonderland Shopping Center in San Antonio, Texas, and Grimshaw entered into an electrical sub-contract with Wright Electric Company on November 22, 1960 (R. 12-13) and a rider to such sub-contract was entered into between Grimshaw and Wright on November 22, 1960 (R. 14-19). The indemnity agreement in question and the pertinent provisions of the written contract (R. 12-13) read as follows:

Pertinent Provisions of Contract of Indemnity

"WHEREAS, Contractor desires to sub-contract to the Sub-Contractor the *furnishing of all materials, tools, and equipment*, and the performing of all work and labor necessary, including shop drawings when required, the testing of materials when required, and the securing of all field measurements necessary or required, for the completion of the following portion or subdivision of the work to be performed in accordance with said Plans and Specifications, including General and Special Conditions and Contract Documents: all Addenda; and supplemental developments thereof and Change Orders relating thereto." (Emphasis added)

"1. That the *Sub-contractor* will furnish all materials, tools, equipment and labor necessary to fully perform all of the above set forth portion or subdivision of the contract between the Owner and the Contractor in accordance with the Plans and Specifications pertaining to the above portion or subdivision of the work to be done."

* * *

"7. *Sub-contractor* agrees to procure, pay for and maintain in full force and effect during the course of the performance of this sub-contract, Workmen's Compensation Insurance and any other insurance required by the laws of the state in which the work covered by this sub-contract is being performed and *shall in any event procure, pay for and maintain in full force and effect Employers' and Public Liability, Automobile, Truck and Property Damage Insurance in such amounts as will protect Contractor against loss or expense and Sub-contractor, notwithstanding any insurance that may be provided for or carried, agrees to be responsible for and indemnifies and agrees to hold Contractor harmless from any loss, injury or damage, either*

"Q. Was it the job of the employees of Martin Wright Elecrtic Company to take care of that equipment furnished by Martin Wright Electric Company?

A. Yes, sir," (R. 283).

* * *

"Q. All right. What kind of materials did you have there in that storeroom?

A. Everything that it took to do the job, conduit, wiring, lighting fixtures." (R. 284).

"Q. And in connection with an electrician working out on the job if his tools and supplies are in the material shack and he is working in another part of the project, of course, it is just common sense that he has to go to and from that material shack from time to time to get some supplies or equipment or other tools while he is working, isn't this true?

A. That's correct." (R. 286).

BY. MR. RICE

"Q. *In going to and from the material shack to get materials in connection with his work, is that part of his work or not?*

A. *Yes, it is.*" (R. 286) (Emphasis added).

It is further undisputed that the workmen's compensation carrier for Wright admitted that Zoller was in the course and scope of his employment on the occasion in question and paid his beneficiaries full death benefits, which it recovered from Grimshaw in the State Court suit. (R. 116-120).

Wright's act of cutting off the light on its employees and in failing to provide its employees adequate lighting as provided in the sub-contract, under the undisputed testimony, was the primary cause of Zoller's injury.

III

THE DECISION OF THE DISTRICT COURT

The District Court set out the undisputed facts as follows:

> "On the evening of July 24, 1961, Wright, pursuant to its sub-contract, was engaged in certain electrical work at the Wonderland Shopping Center. The electricians, one of whom was Elmore C. Zoller, had been working on the second level of the complex. After the work was finished, the employees, including Zoller, went to the basement level to store their tools in a shed furnished by Grimshaw. Zoller was in the process of leaving the premises when he tripped on a piece of wire mesh and fell, striking his head on an upright steel reinforcement rod which pierced his right eye. As a proximate result of the injuries which he sustained, Zoller died on August 1, 1961.
>
> "The evidence clearly indicates that the lighting in the area where Zoller fell was poor. The majority of the light in and around the tool shed was furnished by some fluorescent lights which were located in the tool shed itself. However, when the tool shed was closed and locked at night to protect its contents, the result was a darkening of the area around the shed.
>
> "On July 12, 1963, a suit was brought against Grimshaw by the widow, Pauline C. Zoller, individually and as Independent Executrix of the Estate of deceased, and as Guardian of the persons and estates of their two minor sons, to recover the damages which they had sustained by reason of the injuries and death of their husband and father. Texas Employers Insurance Association, as workmen's compensation carrier for Wright, intervened as a plaintiff.
>
> "Grimshaw, upon commencement of said action,

building and the electricians prior to quitting for the day would leave the place on the premises where they were working about fifteen minutes before quitting time in order that they could take the tools, materials, supplies and equipment of Wright down in the basement and store these items in the storeroom, (R. 82, 112, 128, 160, 173, 286); that on the night in question the employees of Wright were to work up until 9:00 o'clock P.M. and that there were about 35 or 40 electricians working that night and they had all come down to the storeroom about ten or fifteen minutes early so that they could secure their employer's materials and equipment and put up their tools on their employer's time so that they could leave the building and go home at approximately 9:00 o'clock P.M.; that Zoller was one of the electricians on one of these crews and he was the steward for these electricians on this job and he, together with the other electricians had gone into the storeroom and put up their tools and equipment shortly before he was injured; that Zoller was one of the last men to leave the storeroom and *that when these men left the storeroom the doors of the storeroom were closed and locked by the Superintendent of the electricians and by so locking and closing the doors on the storeroom the light that was theretofore presented from the storeroom was cut off;* that immediately after leaving such storeroom and while the electricians were attempting to traverse the lower level of this building in order to climb a ladder and proceed up to the upper level, Zoller in the dark within a very short distance from where he had just left this storeroom stumbled over a piece of wire mesh and fell forward striking a steel dowel and causing his injuries from which he later died; that at the time of this injury, Zoller was on one of the routes that was usually used by the various electricians to go to and from the tool shed and storeroom. (Emphasis added).

The employees of the defendant, Wright, including the President of defendant company testified that in going to and from the tool shack and in leaving the tool shack and attempting to leave the project area the man would still be considered as working (R. 112, 160, 286). In this connection *Earl R. Pizzini,* one of the electricians testified:

> "Like I stated before I am fully responsible for the tools that I use that are his (Wright's) and I am supposed to be given ample time to pick up my tools and the contractor's tools and see that they are put away." (R. 112).

Pizzini further testified that:

> ". . . we are supposed to have ample time to take care of the company tools as well as our own tools and make sure that they are up and safe." (R. 128).

Gary R. Prejean, one of the electricians working that night stated:

> "There was no lights there, we didn't have any flashlights or anything else. The doors to the shack — we had a light in there to our work shack, but it was closed, just through a little crack up at the top, that is all we could see by, we had to lock our tools up at night time." (R. 140).

Prejean further stated in answer to a question:

> "Q. All right, sir. Was there any designated pathway for you all to use, Mr. Prejean, did anybody tell you to use a designated pathway there?
>
> A. No sir. I would say no, because *we were working all over the general area of the job* and whichever way the easiest path to the material shack was that is the one we took, there was never anybody said you have got to walk a certain way." (R. 144-145).

Martin Wright Gordon, President of the Martin Wright Electric Company, among other things testifed:

to persons or property, arising out of or resulting from the performance by Sub-contractor of the work covererd by this sub-contract or occasioned by the act or neglect of Sub-contractor or his agents, servants or employees. In case Sub-contractor does not have his own compensation and other insurance, he is to notify Contractor, and in such case Contractor may include the risk that should be insured by Sub-contractor, under Contractor's policy or p o l i c i e s of insurance and charge the premiums or costs thereof to Sub-contractor or deduct the same from any payments due Sub-contractor hereunder. Certificate of Insurance shall be furnished to Contractor immediately after execution of this Sub-Contract Agreement." (Emphasis added)

* * *

"12. Sub-contractor agrees to keep the building or project to which this sub-contract relates free and clear of mechanics' liens or other encumbrances arising by his act or contract and *shall, at his sole cost and expense, defend against any claim, lien, suit or proceeding that may be presented or filed arising out of and in the course of his performance of this sub-contract.*" (Emphasis added). (R. 12-19)

Stipulations And Admissions

In connection with the pleadings filed herein, the defendant, Wright, has admitted (R. 20-21) "That on or about July 24, 1961, in the evening, defendant pursuant to its sub-contract was upon the premises of the Wonderland Shopping Center and through its agents, servants and employees, defendant was engaged in certain construction work on said premises, and that among other employees of the defendant was an employee by the name of Elmore C. Zoller, who on said date, sustained fatal injuries on the said Wonderland Shopping Center work

site, and that as a proximate result of said injuries, the said Elmer C. Zoller died on or about August 1, 1961." (R. 2-10)

The parties hereto entered into a stipulation designated as "Stipulation No. One" which sets out the loss and expense which Petitioner-Plaintiff incurred and was required to pay out in that certain cause No. F-154,489, styled "Pauline C. Zoller, et al vs. W. R. Grimshaw Company, et al". The District Court in this cause entered its judgment as to amount and interest in accordance with such stipulation. (R. 311-313).

The parties hereto further entered into "Stipulation No. Two" in which was included "Exhibits 3A and 3B" being agreed testimony, from the witnesses Earl R. Pizzini, Gary R. Prejean, Robert Baker, Robert Wade, Robert Zeller, Robert Boubel and Martin Wright Gordon, all employees of Wright, and that such testimony and certain photographs were to be considered by the Court in connection with plaintiffs' Motion for Summary Judgment. (R. 45-287).

Photographs And Testimony

In connection with Stipulation No. Two and Plaintiffs' Exhibits 3A and 3B, there are five photographs of the accident scene which are attached to and made a part of the testimony of the employees of Wright and such photographs are shown on pages 63, 64, 65, 66 and 67 of the Record. These photographs were taken on the morning after the fatal accident in question and they are explained in the testimony of several of the employees of Wright. Under the testimony of the electricians referred to above it is undisputed that Wright was the only sub-contractor on the premises in question on the night of the accident in question and was the only firm that had any men working overtime that night; that the elecricians were using a tool shed or storeroom on the lower level of this

gave notice to Wright of the same, and demanded that it defend the action, but Wright failed to do so.

"Upon a trial of the cause before a jury, the claimants therein were awarded a total sum of $110,123.38. The San Antonio Court of Civil Appeals affirmed the judgment, *Grimshaw v. Zoller*, 396 SW 2d 477 (Tex. Civ. App. 1965), and Grimshaw was compelled to pay the stipulated amount in satisfaction of the judgment.

"The jury, in rendering its verdict, necessarily found negligence against Grimshaw. It found that the lighting in the area where Zoller fell was inadequate, that Grimshaw knew or should have known of its inadequacy, and that the failure to provide adequate light was a proximate cause of Zoller's injuries and subsequent death. It also found that there was wire mesh in the area of the accident, which Grimshaw knew or should have known about, but yet permitted to be in the area, and that this was a proximate cause of Zoller's injuries. In addition, the jury concluded that Grimshaw knew or should have known that the reinforcement rod which caused Zoller's injuries was not bent over, that Grimshaw failed to bend the rod over prior to Zoller's fall, and that such failure was negligence and a proximate cause of the accident. It did not attribute negligence to any of Zoller's actions that night." (Appendix E, infra pages A 20 - A 22; R. 303 - 305).

The District Court then applied Texas law and entered its judgment for petitioner thereon as follows:

"The Court has reviewed the stipulations and the evidence, together with the contract agreement itself, and concludes that the indemnitor, Wright, is liable under the terms of the contract with regard to indemnification.

"To begin with, it is apparent that the deceased

employee's injuries arose out of or resulted from the performance by Wright of the work covered by sub-contract.[1] Generally, the duty owed by a master to exercise ordinary care to protect his servant from injury or death caused by the master's negligence does not cease the instant the servant's working hours are completed but rather, the relationship of master and servant exists for a reasonable time after working hours for the purpose of allowing the servant sufficient time to leave the premises. 76 ALR 2d 1228, S5. In the case of *Foster v. Carle*, 160 SW.2d 999 (Tex. Civ. App. 1942), writ ref. want of merit, the Court said that the duty of an employer to provide a safe place for his workmen does not terminate immediately upon the workman's ceasing to do the particular thing he was employed to do, but if the employee is upon his employer's premises engaged in the performance of some act having to do with his employment, then the employer is under a duty to protect him from injury.

"This Court, of course, cannot ignore the jury's finding of negligence against Grimshaw in the suit by Zoller's family. On the contrary, the weight of authority indicates that an indemnitee, in his action to recover from the indemnitor the amounts paid in satisfaction of a judgment obtained against him by an injured person, is bound by all findings without which the judgment could not have been rendered, and that if the judgment in the earlier action rested on a fact fatal to recovery in the action over

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1/ The Fifth Circuit in Red Ball Motor Freight, Inc. v. Employers Mutual Liability Insurance Co. of Wisconsin, 189 F. 2d 374 (5 Cir. 1951), stated, with respect to the phrase "arising out of", that it contains "words of much broader significance than 'caused by'. They are ordinarily understood to mean 'originating from', 'having its origin in, growing out of' or 'flowing from', or in short, 'incident to, or **having connection with**', ..." (Emphasis supplied). See also: Turner Construction Co. v. The Belmont Iron Works, 158 F. Supp. 309 (E.D. Penn. 1957); Hartford Acc. & Ind Co. v. Cardillo, 112 F. 2d 11 (D.C. Cir. 1940).

against the indemnitor, the latter action cannot be successfully maintained. 24 ALR 2d 330, §2; 30 Am. Jur. 475, §421. Nonetheless, conceding the existence of negligence on the part of Grimshaw, the Court must still conclude that the indemnitor is bound by the provisions of the contract in regard to indemnity.

* * * *

"In Texas, an agreement to idemnify an indemnitee against the consquences of his own negligence is not contrary to the public policy of the state. *Mitchell's, Inc. v. Friedman*, 303 SW 2d 775, 779 (1957). While indemnity contracts are strictly construed against the indemnitee, and the liability of the indemnitor cannot be extended beyond the express terms of the contract, the Supreme Court of Texas has said that it is not necessary for the parties to say in so many words that they intend to protect the indemnitee against liability for negligence, it being sufficient if it clearly appears from the agreement that such was the intention of the parties. *Mitchell's Inc. v. Friedman*, supra. This same position was stated another way by that Court in the recent case of *Ohio Oil Co. v. Smith*, 365 SW 2d 621 (1963), wherein it was pointed out that '* * * in owner-contractor situations, judicial contruction of indemnity clauses to cover the indemnitee's negligence, notwithstanding absence of an express provision to that effect in the contract, has been said to be common.'

"This is not a new ruling. One of the earliest Texas Supreme Court cases dealing with this issue, *Houston & T. C. R. Co. v. Diamond Press Brick Co.*, 222 SW 204 (1920), involved a contract provision under which a brick company agreed to save a railroad 'harmless from any and all claims for damages' arising out of the construction, operation and maintenance of a spur track leading to the brick company's plant. In rejecting the argument that there

would be no indemnity against the railroad's own negligence, the Court stated: '[T]his section would be inoperative and rendered meaningless if construed to exclude negligence, as a claim for damages against the railroad company growing out of any of these things could have no standing in a court unless predicated upon the negligence of the railroad company, or its servants. The section must, we think, be construed as contemplating claims for damages founded upon such negligence.'

"In the case of *Macon v. Warren Petroleum Co.*, 202 F. Supp. 194, 197, affirmed, 316 F. 2nd 287, where a similar situation was presented, this Court, in holding that the deceased employee's injuries clearly arose in connection with his activities while performing the work of the indemnitor under its contract with the indemnitee said: 'To require that there be a causal connection between their "activities" and the thing that produced the injuries, would be to place a highly restricted meaning upon the term and to read into the agreement words that simply are not there. It is unnecessary to look beyond the express terms of the contract itself to see that the parties intended that Warren (the indemnitee) should be indemnified by Alamo (the indemnitor) for any loss sustained as a result of injuries to Alamo's employees, even though they resulted from Warren's own negligence.'

* * * *

"Judgment will accordingly be entered in conformity with the views hereinabove expressed." (Appendix E, infra, pages A 22 - A 25; R. 306 - 310).

IV

THE DECISION OF THE COURT BELOW

This case was argued to the Court of Appeals for the Fifth

Circuit on December 4, 1968, and it was not until October 16, 1969, and after the decision of *Brown & Root v. Service Painting Company of Beaumont,* 437 S.W. (2d) 630, (Tex.Civ.App. March, 1969, error ref.), that the District Court's Judgment was reversed and judgment rendered for respondent, erroneously disregarding *Erie,* supra, and disregarding that Court's prior decisions and disregarding the applicable Texas cases, and citing *Brown & Root,* supra, as authority which was clearly distinguishable on its facts and not an authority controlling the decision of this case. (Appendix B, infra, pages A2-A16).

REASONS FOR GRANTING THE WRIT AND SUMMARY OF ARGUMENT

This case involves special and important legal issues and conflicts important to the orderly administration of justice in the relationship of state and federal courts. These are:

I. The Court of Appeals, in bottoming its decision on a Texas Civil Appeals case which is clearly distinguishable on its facts, and in disregarding the applicable Texas law, violates the Rule of Decision Act, 28 U.S.C.A. Sec. 1652, and the Erie doctrine of this court.

A Federal Court is bound to follow the controlling rules of substantive law as declared by State Legislatures or the highest State Courts in all cases based on diversity of citizenship jurisdiction unless a Federal Constitutional or statutory question is involved. *Erie Railroad Company v. Tompkins,* (1938) 304 U.S. 64, 58 S.Ct. 817; *Fidelity Union Trust Company v. Field,* 61 S.Ct. 176, 311 U.S. 169, 85 L.Ed. 109; *West v. American Telephone & Telegraph Company,* 61 S.Ct. 179, 311 U.S. 223, 85 L.Ed. 139; *King v. Order of United Commercial Travelers of America,* 68 S.Ct. 488, 333 U.S. 153, 92 L.Ed. 608; *Commissioner of Internal Revenue v. Stern,* 78 S.Ct. 1047, 357

U.S. 39, 2 L.Ed. 2d, 1126; *Guaranty Trust Co. of N. Y. v. York*, 65 S.Ct. 1464, 326 U.S. 99; 28 U.S.C.A. Sec. 1652.

This is a diversity of citizenship case and the substantive law of Texas applies to the indemnity agreement in question, since the agreement was executed in Texas and the work to be performed under the sub-contrarct was to be performed in Texas. The trial court applied the Texas law, however, the Court of Appeals has refused to apply the applicable law by bottoming its decision on cases clearly distinguishable on the facts. The Court of Appeals in reversing the trial court at page 7 of the opinion said:

> "The Texas Supreme Court delineated in Spence & Howe Construction Co. v. Gulf Oil Corporation, supra, at 632, that when a question relating to the construction of an indemnity contract is presented the wording of the instrument is to be considered in the light of the surrounding circumstances with the pertinent rules of construction applicable thereto to settle the meaning of the contract. *The trial judge erred in this case in limiting the scope of his inquiry into the circumstances of the accident. The fact that an employee was at work when he was injured does not necessarily answer the question of whether his injury arose out of the performance of that work or resulted from or in connection with the work within the comtemplation of indemnity provisions of contracts,* according to a direct holding of the Court of Civil Appeals of Texas in the recent case of *Brown & Root v. Service Painting Company of Beaumont,* 437 S.W. 2d 630 (1969, error ref.). (Emphasis ours).

The *Brown & Root* case, supra, and *Westinghouse Electric Corporation v. Childs-Bellows,* 352 S.W. 2d, 806 (Tex.Civ.App., 1961 error ref.), cited by the Court of Appeals, both had different indemnity agreements that were being construed

and both were clearly dissimilar and distinguishable on the facts from the case at bar, and, therefore, cannot be any authority upon which to deny petitioner indemnity. In *Brown & Root,* its employees in attempting to bleed air from a line before cutting it, allowed a bumper to fall and crush Carpenter, an employee of the painting sub-contractor. In *Childs-Bellows,* its employees dropped bricks down an elevator shaft, striking employees of Westinghouse, the sub-contractor. In each of those two cases, the Court held that the injuries did not "grow out of" or were not "resulting from the performance or failure to perform the work" of the sub-contract.

In the case at bar, an entirely different situation existed. It must be borne in mind that Wright and its 35 or 40 employees were the only ones on the job site and working on the night in question, and *Wright would have had exclusive control over the portion of the premises it was using to carry out the provisions of its subcontract, and that it was required under such subcontract to furnish its own tools, materials, equipment and labor, and to furnish its own lighting.* The tool room in the basement was used in carrying out such subcontract, and it appears that the lighting there was sufficient to traverse the distance from the tool shed to the stairwell in the lower level after dark with the light that was produced by the tool shack while the doors were open and by the light that was at the stairwell. *The electricians, including Zoller, in closing the tool shed doors cut off their own light* and Zoller, a few feet from the tool shed, and while attempting to get to the stairwell, and because it was dark, stumbled over a piece of wire mesh and was injured. *Wright and its employees therefore, failed to furnish sufficient light for such employees while on the premises and while attempting to carry out the subcontract.* It is obvious that the failure of Wright to supply sufficient lighting for its employees while

down in the basement, was the primary cause of Zoller's fall. (R. 85, 98, 112, 134, 140, 146, 148, 160, 186, 220, 226, 242) The electricians had means available to put a light on the outside of the tool shed, but merely failed to do so until the very next morning after this accident occurred, when they put several lights right outside the tool shed doors. (R. 103, 184, 244, 245, 257, 268, 278, 283) We think that this in itself conclusively shows that Zoller's injuries arose out of the work under the subcontract. There was no active negligence found against Grimshaw in the state court, and the issues found pertained merely to conditions under its nondelegable duty, and that the primary condition, that is "insufficient light" for Wright's employees in connection with their work and where they were required to be, was the real cause of Zoller's injury and of findings being made against the contractor. (Emphasis added).

The furnishing of lighting under the sub-contract, or rather the failure to do so as in this case, by the indemnitor-sub-contractor is a distinguishing feature not found in the *Brown & Root* and *Childs-Bellows* cases. Also, the fact that Wright's employees immediately prior to the accident in question had sufficient lighting, but by their own act, shut off the light on themselves, creating the condition causing Zoller's fall is a highly significant difference. On page 14 of the opinion, the Appellate Court erroneously stated that it could find nothing in the record to support a finding of negligence on the part of Zoller or his fellow employees on the occasion of this accident. In the first place, the evidence shows that Zoller's superintendent, Red Fulmer, closed the doors on the tool shed, shutting off the light on Zoller and the fellow employees after going out of the tool shed and it is wholly immaterial as to whether or not there was any finding of negligence against Zoller. This is an indemnity

suit between Wright and Grimshaw and there was no occasion for the Court or the trier of the facts in the State Court to make any determination of whose responsibility it was for the inadequate lighting in the basement area. The provisions of the sub-contract were not litigated in that proceeding and the jury in that case would have absolutely nothing to do in connection with determining whose responsibility it was for any lighting for the employees of Wright in carrying out its subcontract.

Another distinguishing feature in the case at bar is the additional language in the indemnity agreement *"or occasioned by the act or neglect of sub-contractor or his agents, servants or employees"* and the Court of Appeals has erroneously refused to give such language any credence in construing this indemnity agreement. Had the Court of Appeals applied the law of the applicable Texas cases to the case at bar, it would not have reversed the decision of the District Court.

We do not believe that the Rules Of Decision Act and the *Erie* doctrine of this Court are complied with by a Federal Appellate Court in citing a case that is inapplicable and clearly distinguishable on its facts, and especially, as in this case, when the holding and opinion of the Court of Appeals is contrary to and in conflict with cases directly in point decided by the Supreme Court of Texas and by intermediate Texas Appellate Courts as follows:

> *Houston & T. C. R. Co. v. Diamond Press Brick Co.*, 222 S.W. 204 (Tex.Sup.Ct. 1920); *Mitchell's, Inc. v. Friedman*, 303 S.W. 2d 775 (Tex.Sup.Ct. 1957); *Gulf, Colorado and Santa Fe Railway Company v. McBride*, 322 S.W. 2d 492 (Tex.Sup.Ct. 1959); *Gulf Oil Corporation v. Spence and Howe Construction Co.*, 365 S.W. 2d 631 (Tex.Sup.Ct. 1963); *Smith v. Ohio Oil Company*, 365 S.W. 2d 621 (Tex.Sup.Ct. 1963); *James Stewart & Co. v. H. B. Mobley*, 282

S.W. 2d 290 (Tex.Civ.App. 1955, writ ref'd.); *Crews Well Service v. Texas Company*, 358 S.W. 2d 171 (Tex.Civ.App. 1962, writ ref., n.r.e. 360 S.W. 2d 873; and *Monical and Powell, Inc. v. Bechtel Corp.*, 404 S.W. 2d 911 (Tex.Civ.App. 1966, writ ref., n.r.e.).

The Texas Supreme Court cases of *Ohio Oil* and *Spence & Howe*, cited supra, clearly demonstrate the error of the Court of Appeals in reversing and refusing indemnity in this case. In addition to citing inapplicable cases to support its opinion, the Court of Appeals disregarded pertinent facts as shown above, and has construed the sub-contract and indemnity agreement in question in an artificially strict manner against the indemnitee which render the provisions of the indemnity contract meaningless.

In *Spence & Howe*, supra, the distinction that we are attempting to make here was succinctly stated when the Court held that Cummings' injuries arose "in connection with" the pile driving operation, and that at page 636-637 said:

> "In our opinion the contract and the operations conducted in pursuance thereof cannot be so divided as to make two operations, one conducted by Gulf and the other by Spence & Howe. Under the contract Spence & Howe agreed to 'furnish labor, supervision and equipment and drive piling for six propane tanks.' This was the work or operation covered by the contract. It constituted but one piece of work and the fact that Spence & Howe made use of Gulf equipment and a Gulf employee operator did not alter the situation.
>
> "This case is clearly distinguishable from *Childs-Bellows*, in which the actions resulting in injury — the dropping of heavy items of material upon the Westinghouse employees, — was in no way related to the installation of elevators called for by

> the Westinghouse contract. In the present case, Cummings was injured as a result of an action directly connected with and growing out of the operations covered by the contract of which the indemnity agreement was a part."

See *Brown & Root*, (437 S.W. 2d 630) at page 633 where this same distinction is made.

The legal and practical effect of what the Court of Appeals has done in citing *Brown & Root* and *Childs-Bellows*, which are clearly distinguishable, as authority in this case, is to deny petitioner application of the substantive law of the State just as clearly as if the Court of Appeals had cited no authority or had cited an authority on a different subject matter and had handed down its own policy making decision for the State of Texas, which is prohibited by the Rules of Decision Act and the *Erie* doctrine of this Court. This illustrates the extreme importance for the granting of this writ. Furthermore, the decision of the Court of Appeals should not be allowed to stand, because on the facts presented in the case at bar, such opinion is in conflict with the applicable Texas cases cited above and in conflict with prior holdings of the Fifth Circuit on similar indemnity agreements.

II. The holding and opinion of the Court of Appeals is contrary to and in conflict with its prior holdings on the subject matter in issue.

When applied to the uncontradicted facts of the case at bar, as we have set out above, the opinion of the Court of Appeals on the question of whether indemnity should be granted in this cause, is actually in conflict with three of its prior holdings, namely, *Alamo Lumber Company v. Warren Petroleum Corporation*, 316 F. 2d 287 (5th Cir., 1963); *American Agricultural Chemical Company v. Tampa Armature Works*, 315 F. 2d 856 (5th Cir., 1963); and *Jacksonville Term-*

inal Co. v. Railway Express Agency, Inc., 296 F. 2d 256 (5th Cir., 1962), Cert. Den. 369 U.S. 860, 82 S.Ct. 949, 8 L. Ed. 2d 18.

The Court of Appeals referred to the *Alamo Lumber* case, supra, which was relied upon by the District Judge in the case at bar, but then went on to repudiate such decision on the theory that the Court of Civil Appeals of Texas in the *Brown & Root* case would not have considered such decision as controlling in that case. It is certainly obvious that, since the facts in *Brown & Root* were entirely different from the facts in *Alamo*, as in the case at bar, the *Alamo* decision could not be used to support the holding in *Brown & Root*. In our case, however, the *Alamo* case, which is similar to the facts of the case at bar, was clearly applicable and should have been applied by the Court of Appeals. In *Alamo*, Judge Wisdom, after quoting at length from *Childs-Bellows* and mentioning *American Agricultural Chemical Co. v. Tampa Armature Works, Inc.*, supra, had this to say:

> "In neither case was the injury sustained *'in connection with'* the work required by contract. Here, however, Alamo had contracted to install cabinets, and when the two men were overcome by gas they were admittedly installing the cabinets near the uncapped pipe. Since the only requirement for indemnity is that the employee's injury have some connection with Alamo's work, Warren is entitled to recovery over against Alamo." (316 F. 2d at 290, emphasis by the Court).

In *American Agricultural Chemical Co. v. Tampa Armature, Inc.*, supra, the Fifth Circuit Court granted indemnity to appellant reversing the summary judgment previously granted to appellee and reversing the case so that summary judgment be granted to the appellant - indemnitee. In that case employees of an electrical contractor brought actions against the owner of realty for injuries caused by the in-

halation by the employees of Phosphorous fumes alleged to have been negligently let loose by the owner while electrical work was being done on the owner's premises. The Court at page 860 of the opinion said:

> "The responsibility of the contractor (indemnitor) for the claims of Powell and Nye is clear and unequivocal. They are embraced in the language 'all claims . . . of any and all persons.' The injuries forming the basis of the claims were sustained 'in connection with' the work of the contract."

The Court in *Tampa* went on to cite *Jacksonville Co. v. Railway Express Agency, Inc.*, supra, and at page 858 of the opinion said:

> "That case, just as this, involved a Florida contractor. We pointed out there that Florida law controlled the construction and validity of the indemnity clause in dispute, and that under Florida law, as elsewhere, the cardinal rule of construction is to ascertain the intention of the contracting parties and to give effect to that intention if it can be done consistently with legal principles. Where the language chosen by the parties, given its ordinary and natural meaning, unambiguouly manifests that intention, the judicial task is at an end."

In *Jacksonville Terminal* case, supra, a switchman employed by the Terminal Company was injured while performing duties in connection with the switching of express cars for the Terminal Company on the property leased to Railway Express, when he stepped on a rotten crosstie and fell. The Court granted indemnity to the Terminal Company against Railway Express and rested its conclusion on the basis that the words "in connection with" in an indemnity contract are to be given their natural and ordinary meaning, and thus the injuries sustained arose in connection with the occupation and use of the premises by Railway Express.

In the case at bar, the District Court in construing the phrase "arising out of" as used in the indemnity agreement in question, cited the prior holding by the Fifth Circuit in *Red Ball Motor Freight v. Employer's Mutual Liability Insurance Co.*, supra, and the Court of Appeals by its decision has repudiated the connotation given to such phrase by the same Court in another case merely because it involved a policy of automobile insurance. Under the present state of the law in the Fifth Circuit, we now have one Court stating that the phrase "arising out of" contains words of much broader significance than "caused by" and or ordinarily understood to mean "originating from," "having its origin in," "growing out of" or "flowing from," or in short, "incident to, or having connection with," and on the other hand, the same Court says that is not what it means. How is anyone going to write or administer an indemnity agreement with such conflict in the law? Also, the conflict created by the present decision in the case at bar, would make it possible for a litigant to take his suit for indemnity into the State Court and to have the State Court decisions applied granting him indemnity, but if the same case on the same facts is brought in the Federal Court and on appeal to the Fifth Circuit that a contrary decision would be there rendered denying indemnity. These conflicts should be rectified by this Court.

III. This being a Summary Judgment proceeding, if the Court cannot hold as a matter of law that Wright under its Sub-contract with Grimshaw was required to furnish its own lighting for its own employees on the occasion in question, then a fact issue on such matter existed, and the Court of Appeals in rendering Summary Judgment against petitioner denied petitioner due process and the equal protection of the laws by denying it a trial on a material issue of fact, and this cause should be reversed and remanded.

In the sub-contract in question, Wright agreed to furnish

all of the materials, tools, equipment, and labor necessary for the completion of certain electrical work on the Wonderland complex. The District Court after setting out the facts, stated "The Court has reviewed the stipulations and the evidence, together with the contract agreement itself, and concludes that the indemnitor, Wright, is liable under the terms of the contract with regard to indemnification."

The facts show that electricians were on the job site alone and at night, and it was dark and they needed light to work and to put up their tools and materials and to carry out their duties under the sub-contract. Petitioner contends that as a matter of law, Wright was required to furnish such lighting and that the failure of Wright in this regard on the occasion in question furnishes a basis for indemnity and that the Appellate Court erroneously refused to so hold.

On the other hand, if the responsibility for furnishing the lighting for Wright and its employees in carrying out its sub-contract is not determinable as a matter of law, then a fact issue on such matter existed, and the Court of Appeals had no authority to render summary judgment for Wright, the defendant - indemnitor and to dismiss this cause, since by so doing, Grimshaw, plaintiff - indemnitee was d e n i e d due process and the equal protection of the laws by denying it a trial on a material issue of fact.

Even though both parties move for summary judgment in a case, the denial of a summary judgment for the plaintiff does not necessarily mean that summary judgment be granted to the defendant.

In *Poller v. Columbia Broadcasting System*, (1962) 82 S.Ct. 486, 368 U.S. 464, and *Sartor v. Arkansas Natural Gas Corporation*, (1944) 64 S.Ct. 724, 321 U.S. 620. this Court held in effect that summary judgment is authorized only where the moving

party is entitled to judgment as a matter of law, where it is clear what the truth is, and where no general issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they have issues to try. *Fed. Rules Civ. Proc., Rule 56 (c), 28 U.S.C.A.* This Court reversed and remanded each of such cases on the ground that genuine issues as to material facts existed precluding summary judgment.

The writ herein applied for should be granted by this Court to review the important questions presented here in connection with the application of the proper substantive law and with the conflicts between the Texas decisions and with the Court of Appeals' opinion in the case at bar and with the conflicts between such decision and the prior decisions of the same Court. Also it should be granted, to determine if a genuine issue of fact exists and if so, to remand the cause, since petitioner has no other redress on such point except to this Court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

ALFRED W. OFFER
Attorney for Petitioner

Of Counsel:
CARL WRIGHT JOHNSON

APPENDIX A.

TITLE 28, UNITED STATES CODE

Sec. 1652. State Laws as Rules of Decision.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.

Appendix B

Opinion Of The Court Below.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26260

MARTIN WRIGHT ELECTRIC COMPANY,
Appellant,

versus

W. R. GRIMSHAW COMPANY,
Appellee.

Appeal from the United States District Court for the Western District of Texas

Argued December 4, 1968

Before THORNBERRY and SIMPSON, Circuit Judges, and CASSIBRY, District Judge

Opinion of the Court
(Filed October 16, 1969)

CASSIBRY, District Judge: This is an appeal from a judgment awarding indemnity on the granting of W. R. Grimshaw Company's motion for summary judgment and denying the cross-motion of Martin Wright Electric Company for summary judgment.

We reverse, set aside the award of indemnity and grant the cross-motion of Martin Wright Electric Company for summary judgment.

On November 22, 1960 W. R. Grimshaw Company [Grimshaw], the general contractor for the construction of Wonderland Shopping Center near San Antonio, Texas, entered into a subcontract with Martin Wright Electric Company [Wright] for the completion of certain of the electrical work. This suit arises out of a dispute as to the liability of Wright, the indemnitor, to Grimshaw, the indemnitee, under the indemnity provisions of this subcontract.

On the evening of July 24, 1961 Wright's electricians worked overtime on the second level of the complex. As was customary the crew devoted the last fifteen minutes of their working time to taking their tools to the basement level to store them in a shed furnished by Grimshaw. While leaving the basement area after the tools were stored one of the employees, Elmo Zoller, tripped on some wire mesh and fell onto a metal dowel which pierced his right eye. He died as a result of the injury on August 1, 1961.

A suit was brought against Grimshaw in July 1963 in the state district court by the widow, Pauline C. Zoller, individually and as independent executrix of her husband's estate, and as guardian of their two minor sons, for damages sustained by reason of the injuries to, and death of, their husband and father. Upon commencement of this action Grimshaw gave notice of it to Wright and called upon Wright to defend the action, but Wright failed to do so. The workmen's compensation carrier for Wright, Texas Employers Insurance Association, intervened as a plaintiff and all plaintiffs,

pursuant to a jury verdict, were awarded a total sum of $110,123.38.

This jury verdict was based upon several findings of negligence against Grimshaw. The jury found that the lighting in the area where Zoller fell was inadequate, that Grimshaw knew or should have known of its inadequacy, that Grimshaw failed to provide adequate temporary lighting at the time and on the occasion of Zoller's fall and such failure was a proximate cause of his injury and death; that there was wire mesh in the area where Zoller fell which Grimshaw knew or should have known about yet Grimshaw nevertheless permitted the wire mesh to be in the area and this was a proximate cause of the accident; that Grimshaw knew or should have known that the metal dowel on which Zoller fell was not bent over, that Grimshaw failed to bend over the dowel prior to Zoller's fall and that such failure was a proximate cause of his injury and death. It found no negligence attributable to Zoller.

Grimshaw was compelled to pay the judgment when it was affirmed,[1] and he brought this suit on October 3, 1966 to recover from Wright under the indemnity provisions of the contract the amount of the judgment, $110,123.28, plus the sums it had been compelled to pay in that suit for attorneys' fees and other expenses, a sum of $12,310.88, plus attorneys' fees in the instant suit, calculated at ten percent of the total or $12,243.41. Grimshaw filed motion for summary judgment on

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[1]Grimshaw v. Zoller, 396 S.W.2d 477 (Tex. Civ. App. 1965).

December 15, 1967, relying on the record of the case in the state court to show that no genuine issue as to any material fact exists in this cause, and Wright filed a cross-motion thereto. After hearing both parties on their motions for summary judgment the District Court sustained the plaintiff's motion, except for attorneys' fees in this case, and awarded it $135,247.45, which included the amount of the state court judgment, the expenses and attorneys' fees of that suit, and accrued interest at six percent in the amount of $14,313.29, and denied Wright's cross-motion. Wright appealed.

The District Court concluded that Wright owed Grimshaw indemnity, in spite of the findings of negligence against Grimshaw, under the following indemnity provision of the agreement between them:

> "* * * and sub-contractor, notwithstanding any insurance that may be provided for or carried, agrees to hold Contractor harmless from any loss, injury or damage, either to persons or property, arising out of or resulting from the performance by sub-contractor of the work covered by this sub-contract or occasioned by the act or neglect of sub-contractor or his agents, servants or employees."[2]

The agreement provided additionally that the subcontractor would keep the complex "* * * free and

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[2]In furtherance of the indemnity, the agreement required that the subcontractor maintain workmen's compensation, automotive liability and public liability insurance.

clear of mechanics liens or other encumbrances arising by (his) act or contract and shall, at (his) sole cost and expense, defend against any claim, lien, suit or proceeding that may be presented or filed arising out of and in the course of (his) performance of this sub-contract."

The trial judge, cognizant of the Texas rule that an indemnity agreement will be enforced in accordance with its terms even though the indemnitee may thereby be relieved of the consequences of his own negligence,[3] considered that no causal connection between the performance of the work and the thing that produced the injury was required by the terms of the contract, and that Zoller's injuries arose out of or resulted from the performance by Wright of the work covered by the subcontract within the terms of the indemnity agreement provisions because Zoller was still at work[4] when he was injured. He regarded the broad connotation given to the phrase "arising out of" in a policy of automobile insurance by the Fifth Circuit Court of Appeals in the case of *Red Ball Motor Freight v. Employers Mut. Liability Ins. Co. of Wisconsin*, 189

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[3]Mitchell's v. Friedman, 157 Tex. 424, 303 S.W.2d 775; Ohio Oil Company v. Smith, 365 S.W.2d 621 (Tex. Sup. Ct. 1963); Spence & Howe Construction Company v. Gulf Oil Corporation, 365 S.W.2d 631 (Tex. Sup. Ct. 1963). Since the instant case was argued, the Texas Supreme Court in City of Beaumont v. Graham, 441 S.W.2d 829 (1960), again recognized the rule, but regarded the indemnity agreement in that case as less broad than those in *Ohio Oil* and *Mitchell* so as not to extend to the negligence of the indemnitee.

[4]Foster v. Carle, 160 S.W.2d 999 (Tex. Civ. App. 1942, writ ref. want of merit), workmen's compensation problem of meaning of "course of employment" under Texas Compensation Act.

F.2d 374 (1951) as persuasive in determining the issue of indemnity under the contract language here.[5]

Appellant Wright contends that the District Court erred in deciding that the fact that Zoller was at the time of his injury within the scope of his employment within the meaning of the Texas Workmen's Act was decisive of the issues presented in this case by this indemnity agreement; that the phrase in this agreement "arising out of or resulting from the performance by sub-contractor of the work covered by this contract" does not include an injury "arising out of or resulting from" acts or omissions of the general contractor occurring at a time when, and at a place where, no work of the subcontractor was being performed, and that any uncertainty, doubt or ambiguity in the contract must be construed in favor of Wright the indemnitor.

Appellee Grimshaw contends that the District Court correctly found that it was entitled to indemnity under the agreement because Zoller's injuries arose out of the performance of Wright's work because they clearly arose in connection with his attempt to perform and carry out Martin Wright's work covered by the subcontract, since his putting away of his employer's tools and equipment was as much a part of the subcontract as any other activity that needed to be carried out by Wright's employees on the job site. Additionally it con-

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[5]The Fifth Circuit stated that the phrase "arising out of" contains "words of much broader significance than 'caused by', and are ordinarily understood to mean 'originating from', 'having its origin in', 'growing out of' or 'flowing from', or in short, 'incident to, or having connection with', . . ."

tends that the words in the agreement "or occasioned by the act" of subcontractor or its employees show a broader application of the indemnity agreement, and when the ordinary rules of construction are applied, it is clear that the parties to the agreement intended that Wright fully protect, indemnify and hold Grimshaw harmless against all liability and damages resulting from injury to Wright's employees, regardless of how it arose, or whose act or negligence caused it.

The Texas Supreme Court delineated in *Spence & Howe Construction Co. v. Gulf Oil Corporation, supra* at 632, that when a question relating to the construction of an indemnity contract is presented the wording of the instrument is to be considered in the light of the surrounding circumstances with the pertinent rules of construction applicable thereto to settle the meaning of the contract. The trial judge erred in this case in limiting the scope of his inquiry into the circumstances of the accident. The fact that an employee was at work when he was injured does not necessarily answer the question of whether his injury arose out of the performance of that work or resulted from or in connection with the work within the contemplation of indemnity provisions of contracts, according to a direct holding of the Court of Civil Appeals of Texas in the recent case of *Brown & Root v. Service Painting Company of Beaumont,* 437 S.W.2d 630 (1969, error ref.).

In that case Service Painting Company had entered into a subcontract with Brown & Root, the general contractor for installation of a coveyor system in a plant at Evadale, Texas, for painting work wherein it agreed

to indemnify Brown & Root against all claims for injuries occurring *in connection with* the performance of the sublet work. Brown & Root under its general contract was required to install an automatic handling system for rolls of paper, which included a bumper device that could be raised or retracted below the floor level. Chester M. Carpenter, an employee of Service Painting Company, was fatally injured while he and another employee were underneath the bumper in a pit below the floor level engaged in painting work called for by the subcontract. A leak occurred in the air line controlling the bumper making it necessary for pipe fitters of Brown & Root to bleed the air from the line before cutting it. One of their employees did this and the bumper descended crushing Carpenter at a time when he was actually engaged in his painting activities, but the raising and lowering of the bumper had nothing to do with the painting activities.

After Brown & Root had settled a claim against it by Carpenter's wife for damages for personal injuries which caused her husband's death, it claimed indemnity against Service Painting Company under the indemnity provision of the subcontract. The District Court denied indemnity and Brown & Root appealed contending that Service Painting Company was liable to it under the indemnity provision although the damages arose out of its sole negligence.

The Court of Civil Appeals said of the argument which is very similar to the argument of Grimshaw here:

> "Appellant's argument is deceptively simple and, at first blush, seems unanswerable. It proceeds along these lines: Carpenter was killed at a time when he was painting under the bumper which descended upon him. Not only was he acting in the scope of his employment, but also it was the very work which he was doing which placed him in the position of danger wherein he met his death. Thus, in painting the area beneath the bumper, Carpenter was clearly effectuating the object of the subcontract. It then follows, according to appellant, that 'he met his death in connection with work which he was performing under the subcontract' and appellants are entitled to indemnify." (437 S.W.2d at 632).

After deciding that the Texas jurisprudence involving indemnity agreements did not support the appellant's argument, the court rejected it, and affirmed the judgment of the lower court saying:

> "Carpenter's death did not grow out of any work undertaken by Service Painting Company; but, according to the undisputed evidence and the findings of the court, was due solely to negligence of employees of Brown & Root performing work under the general contract. This work had no connection with the painting and was work with which Service Painting Company had no connection." (437 S.W.2d at 634)

An analysis of the relevant Texas jurisprudence shows that when the accident or injury is caused by the negligence of the indemnitee, the circumstances of the cause of the accident, the negligent acts or omissions, are examined by the courts to determine if they had any connection with, involvement with or relation to the performance of the work of the indemnitor. If they had none, the injuries are not considered as having any "connection with" the work, "arising out of" it, or "resulting from" it under language of contracts having such broad connotation.

The indication of the judicial propriety of this scope of inquiry into the circumstances of the accident in such cases was made in *Westinghouse Electric Corporation v. Childs-Bellows*, 352 S.W.2d 806 (Tex. Civ. App., 1961, error ref.). In that case Westinghouse, the subcontractor for the installation of elevators in a bank building, agreed to indemnify Childs-Bellows against all loss "growing out of, or incident to or resulting from the performance or failure to perform the work" of the subcontract. Employees of Westinghouse were injured while in the course and scope of their employment, in furtherance of the work of Westinghouse, when employees of Childs-Bellows negligently dropped objects down the elevator shaft upon them. The Court of Civil Appeals recognized that under *Mitchell's Inc. v. Friedman*, *supra*, it was not necessary for the parties to say in so many words that they intended to protect Childs-Bellows against liability for its negligence, if the terms of the agreement clearly indicated such intention, but reasoned

> "In the instant case, however, in view of the provisions of the indemnity agreement, it is clear that indemnity was intended to extend only to injuries to persons growing out of or incident to or resulting from performance, or the failure to perform, on the part of Westinghouse, the work of installing the elevators. The agreement does not show an intent by the parties to indemnify Childs-Bellows for injuries to persons resulting from work which was under the exclusive jurisdiction of Childs-Bellows as general contractor. The injuries sustained by the Westinghouse employees were not injuries growing out of any work undertaken by Westinghouse but, according to the stipulations, were due solely to negligence of employees of the general contractor, Childs-Bellows, in work which in so far as the stipulations show had no connection whatever with the installation of the elevators, and work with which Westinghouse had no connection." (352 S.W.2d at 808)

Ohio Oil Company v. Smith, supra, and *Spence & Howe Construction Co. v. Gulf Oil Co., supra,* relied upon by Grimshaw, are cases in which indemnitors were found to be liable for injuries caused by the indemnitee's negligence, but examination shows that they are consistent with the *Brown & Root* and *Childs-Bellows* cases, *supra.* In the *Ohio Oil* case, Ohio Oil was held to be entitled to indemnity under the wording of the indemnity provision of a work-over contract "arising out of or attributed, directly or indirectly, to the opera-

tions of contractor" where an employee of the indemnitor was injured when he fell from a defective furnished by Ohio Oil and *being used in the work-over operation.*

In the *Spence & Howe* case the indemnitee was held entitled to indemnity where its negligent employee operating its crane in the piling driving work of the indemnitor caused injury to an employee of the indemnitor under a contract wording "arising by reason of accidents * * * in connection with such work."

Our careful study of the other cases decided by state courts in Texas relied upon by Grimshaw as supporting the opinion and judgment of the District Court convinces us that they are not apposite to the problems presented by this case.[6]

The case of *Macon v. Warren Petroleum Corporation*, 202 F.Supp. 194 (W.D. Tex. 1962), affirmed in *Alamo Lumber Company v. Warren Petroleum Corporation*, 316 F.2d 287 (5th Cir. 1963), relied upon by the District Judge in his opinion, would appear at first blush to support the argument of Grimshaw that, if Zoller was at work when he was injured, his injuries arose out of his work. In that case Alamo Lumber Company had a contract with Warren Petroleum Corporation to perform certain work at Warren's gasoline

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[6]Houston & T.C.R. Co. v. Diamond Press Brick Co., 111 Tex. 18, 222 S.W. 204 (1920); James Stewart & Co., Inc. v. H. B. Mobley, 282 S.W.2d 290 (Tex. Civ. App. 1955, Writ ref.); Mitchell's Inc. v. Friedman, 157 Tex. 424, 303 S.W.2d 775 (1957); Gulf Colorado and Santa Fe Railway Company v. McBride, 322 S.W.2d 492 (Tex. Sup. Ct. 1959); Crews Well Service v. Texas Company, 358 S.W.2d 171 (Tex. Civ. App. 1962, Writ ref.); Monical and Powell, Inc. v. Bechtel Corp., 404 S.W.2d 911 (Tex. Civ. App. 1966, Writ ref).

plant near Fashing, Texas in which Alamo agreed to indemnify Warren for damages "which arise out of or in connection with the activities of [Alamo]". Two of Alamo's employees were overcome by gas fumes that were negligently permitted by Warren to be introduced into the room where they were doing carpentry work under the contract. Alamo resisted Warren's claim for indemnity arguing that the negligent act of Warren which caused the injuries was unrelated to the activities of Alamo. Warren contended that the injuries undisputedly arose in connection with the activities of Alamo "it being obvious that the plaintiffs would not have been injured if they had not been working at the place and time in question." The District Court concluded that the plaintiffs' injuries clearly arose in connection with their activities under the contract and allowed recovery. The Fifth Circuit Court of Appeals affirmed with the following discussion of the circumstances:

> "During the course of Alamo's construction in the laboratory, it was found necessary to remove a sink, and two of the pipes leading into it, a gas pipe and an intake water pipe, were plugged up. A third pipe, for sewer drainage, was disconnected but was left open. Waste gas from Warren's natural gasoline plant backed up in the sewer and was discharged through the open pipe into the laboratory while two of Alamo's employees were working there. Both men were overcome by the poisonous gas and became unconscious before they could get out of the room." (316 F.2d at 288)
>
> "* * *

> "* * Here * * Alamo had contracted to install cabinets, and when the two men were overcome by gas they were admittedly installing the cabinets near the uncapped pipe. Since the only requirement for indemnity is that the employee's injury have some connection with Alamo's work, Warren is entitled to recovery over against Alamo." (316 F.2d at 290)

The Court of Civil Appeals of Texas in the *Brown & Root* case shows by its discussion of the *Alamo Lumber* case that it would not regard it as supporting the argument Grimshaw makes here. After quoting the last paragraph above that court said:

> "It was conclusively shown in *Alamo Lumber* that the work of installing the cabinets under the sub-contract — the subject of the sub-contract — necessitated the removal of pipes leading to a sink, and the gas backed up in the open pipe, injuring the men. It was the act of Alamo's employees which created the very condition causing their injury." (437 S.W.2d at 634)

The injury to Zoller in the instant case was caused by the negligence of Grimshaw,[7] and the lighting in

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[7]Grimshaw suggested in brief that Zoller's own act was the cause of his injury and on argument of the case counsel contended that Zoller was killed by his own negligence and the negligence of his fellow employees in that they did not have for their use lights that were necessary to keep them from stumbling and falling, or had not installed the necessary lights. Grimshaw's

the basement area, the wire mesh, the metal dowel nor Grimshaw's omissions in regard to them causing the injuries had any relation to, connection or involvement with the performance by Wright of the electrical work under the subcontract, and his injuries therefore cannot be regarded as arising out of or resulting from the performance by Wright of the work covered by the subcontract, and Wright is not liable to Grimshaw under the indemnification provisions of the contract.

We find no merit in the contention that the parties to the subcontract in this case intended that Wright fully protect, indemnify and hold Grimshaw harmless against all liability and damages resulting from injury to Wright's employees, regardless of how it arose, or whose act or negligence cause it by the further words in the agreement "or occasioned by the act" of subcontractor or its employees.

The judgment in favor of appellee is reversed, the award of indemnity is set aside, and the cross-motion of appellant for summary judgment is granted dismissing the action.

REVERSED AND RENDERED.

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motion for summary judgment was submitted on the basis of the case in which judgment was rendered against it and in which Zoller was found to be free of negligence. We find nothing in the record in that case to support a finding of negligence on the part of Zoller or his fellow employees on the occasion of this accident. No reason suggests itself for disagreeing with the jury in that case that the responsibility for the inadequate lighting in the basement area was Grimshaw's.

APPENDIX C.

Judgment of the Court Below

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1968

No. 26260

D. C. Docket No. 66-99-SA-Civil Action

MARTIN WRIGHT ELECTRIC COMPANY,
Appellant,

versus

W. R. GRIMSHAW COMPANY,
Appellee.

Appeal from the United States District Court for the Western District of Texas

Before THORNBERRY and SIMPSON, Circuit Judges, and CASSIBRY, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and rendered in accordance with the opinion of this Court.

It is further ordered that appellee pay to appellant, the costs on appeal to be taxed by the Clerk of this Court.

October 16, 1969

Issued as Mandate:

addition, the jury concluded that Grimshaw knew or should have known that the reinforcement rod which caused Zoller's injuries was not bent over, that Grimshaw failed to bend the rod over prior to Zoller's fall, and that such failure was negligence and a proximate cause of the accident. It did not attribute negligence to any of Zoller's actions that night.

This present controversy arises because of Grimshaw's contention that Wright is liable to it under the above quoted provisions in the sub-contract agreement. Wright, however, takes the position that the agreement does not bind it to indemnify Grimshaw, under the circumstances of this case, against Grimshaw's own negligence (as determined on the trial of the case wherein Grimshaw was named defendant), and that further, Zoller's injuries did not arise out of or result from the performance of the sub-contract by Wright, but rather they occurred at a time when Wright's employee was doing nothing other than walking off the job to go home. Wright further contends that with respect to the situation before this Court coverage by the indemnitor for negligent acts of the indemnitee is neither apparent nor intended.

The Court has reviewed the stipulation and the evidence, together with the contract agreement itself, and concludes that the indemnitor, Wright, is liable under the terms of the contract with regard to indemnification.

To begin with, it is apparent that the deceased employee's injuries arose out of or resulted from the performance by Wright of the work covered by the sub-contract.[1] Generally,

[1]The Fifth Circuit in Red Ball Motor Freight, Inc. v. Employers Mutual Liability Insurance Co. of Wisconsin, 189 F. 2d 374 (5 Cir. 1951), stated, with respect to the phrase "arising out of", that it contains "words of much broader significance than 'caused by'. They are ordinarily understood to mean 'originating from', 'having its origin in', 'growing out of' or 'flowing from', or in short, 'incident to, or **having connection with**', ..." (Emphasis supplied). See also: Turner Construction Co. v. The Belmont Iron Works, 158 F. Supp. 309 (E.D. Penn. 1957); Hartford Acc. & Ind. Co. v. Cardillo, 112 F. 2d 11 (D.C. Cir. 1940).

the duty owed by a master to exercise ordinary care to protect his servant from injury or death caused by the master's negligence does not cease the instant the servant's working hours are completed but rather, the relationship of master and servant exists for a reasonable time after working hours for the purpose of allowing the servant sufficient time to leave the premises. 76 ALR 2d 1228, §5. In the case of *Foster v. Carle*, 160 SW 2d 999 (Tex. Civ. App. 1942), writ ref. want of merit, the Court said that the duty of an employer to provide a safe place for his workmen does not terminate immediately upon the workman's ceasing to do the particular thing he was employed to do, but if the employee is upon his employer's premises engaged in the performance of some act having to do with his employment, then the employer is under a duty to protect him from injury.

This Court, of course, cannot ignore the jury's finding of negligence against Grimshaw in the suit by Zoller's family. On the contrary, the weight of authority indicates that an indemnitee, in his action to recover from the indemnitor the amounts paid in satisfaction of a judgment obtained against him by an injured person, is bound by all findings without which the judgment could not have been rendered, and that if the judgment in the earlier action rested on a fact fatal to recovery in the action over against the indemnitor, the latter action cannot be successfully maintained. 24 ALR 2d 330, §2; 30 Am. Jur. 475, §421. Nonetheless, conceding the existence of negligence on the part of Grimshaw, the Court must still conclude that the indemnitor is bound by the provisions of the contract in regard to indemnity.

Wright, the indemnitor-defendant here, argues that indemnity was only incidental to the main purpose of the contract; that the contract was prepared by plaintiff; that the contract is unclear, uncertain, doubtful or ambiguous; and

ing indemnity provision:

> "* * * * and sub-contractor, notwithstanding any insurance that may be provided for or carried, agrees to hold Contractor harmless from any loss, injury or damage, either to persons or property, arising out of or resulting from the performance by sub-contractor of the work covered by this sub-contract or occasioned by the act or neglect of sub-contractor or his agents, servants or employees."

In furtherance of the indemnity, the agreement required that the sub-contractor maintain workmen's compensation, as well as automotive liability and public liability, insurance.

In addition, the agreement provided that the sub-contractor would keep the complex "* * * * free and clear of mechanics liens or other encumbrances arising by (his) act or contract and shall, at (his) sole cost and expense, defend against any claim, lien, suit or proceeding that may be presented or filed arising out of and in the course of (his) performance of this sub-contract."

The undisputed facts here are as follows:

On the evening of July 24, 1961, Wright, pursuant to its sub-contract, was engaged in certain electrical work at the Wonderland Shopping Center. The electricians, one of whom was Elmore C. Zoller, had been working on the second level of the complex. After the work was finished, the employees, including Zoller, went to the basement level to store their tools in a shed furnished by Grimshaw. Zoller was in the process of leaving the premises when he tripped on a piece of wire mesh and fell, striking his head on an upright steel reinforcement rod which pierced his right eye. As a proximate result of the injuries which he sustained, Zoller died on August 1, 1961.

The evidence clearly indicates that the lighting in the

area where Zoller fell was poor. The majority of the light in and around the tool shed was furnished by some fluorescent lights which were located in the tool shed itself. However, when the tool shed was closed and locked at night to protect its contents, the result was a darkening of the area around the shed.

On July 12, 1963, a suit was brought against Grimshaw by the widow, Pauline C. Zoller, individually and as Independent Executrix of the Estate of deceased, and as Guardian of the persons and estates of their two minor sons, to recover the damages which they had sustained by reason of the injuries and death of their husband and father. Texas Employers Insurance Association, as workmen's compensation carried for Wright, intervened as a plaintiff.

Grimshaw, upon commencement of said action, gave notice to Wright of the same, and demanded that it defend the action, but Wright failed to do so.

Upon a trial of the cause before a jury, the claimants therein were awarded a total sum of $110,123.38. The San Antonio Court of Civil Appeals affirmed the judgment, *Grimshaw v. Zoller*, 396 SW 2d 477 (Tex. Civ. App. 1965), and Grimshaw was compelled to pay the stipulated amount in satisfaction of the judgment.

The jury, in rendering its verdict, necessarily found negligence against Grimshaw. It found that the lighting in the area where Zoller fell was inadequate, that Grimshaw knew or should have known of its inadequacy, and that the failure to provide adequate light was a proximate cause of Zoller's injuries and subsequent death. It also found that there was wire mesh in the area of the accident, which Grimshaw knew or should have known about, but yet permitted to be in the area, and that this was a proximate cause of Zoller's injuries. In

APPENDIX D.

Order of the Court Below on Petition for Rehearing and Petition for Rehearing En Banc

IN THE

UNITED STATES COURT OF APPEALS

THE FIFTH CIRCUIT

No. 26260

MARTIN WRIGHT ELECTRIC COMPANY,

Appellant,

versus

W. R. GRIMSHAW COMPANY,

Appellee.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(November 26, 1969)

Before THORNBERRY and SIMPSON, Circuit Judges, and CASSIBRY, District Judge.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX E.

Opinion of the District Court

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

W. R. GRIMSHAW COMPANY, Plaintiff, v. MARTIN WRIGHT ELECTRIC COMPANY, Defendant	CIVIL ACTION NO. 66-99-SA

OPINION

Plaintiff, W. R. Grimshaw Co. (hereinafter referred to as Grimshaw), has brought this suit seeking recovery from defendant, Martin Wright Electric Co. (hereinafter referred to as Wright), certain sums alleged to be due and owing by the defendant, pursuant to a contract of indemnity. Having concluded that there is no genuine issue as to any material fact, and that the plaintiff is entitled to judgment as a matter of law, its motion for summary judgment will be granted.

On the 18th day of October, 1960, Grimshaw entered into a written contract with Community Realty Co., whereby Grimshaw, as general contractor, agreed to furnish all materials and perform all labor for the complete construction of Wonderland Shopping Center at San Antonio, Texas.

Subsequentl,y on November 22, 1960, Grimshaw entered into a sub-contract with Wright wherein the latter agreed to furnish all the materials, tools and labor necessary for the completion of certain electrical work on the Wonderland complex.

Among other things, the agreement contained the follow-

that, under the circumstances of this case, the contract should be construed in favor of the defendant, citing *City of Beaumont v. Graham,* 423 SW 2d 105 (Tex. Civ. App. 1967), wherein the Court could find no clear intention that the indemnitee be indemnified for damages growing out of the joint negligence of the parties.

In Texas, an agreement to indemnify an indemnitee against the consequences of his own negligence is not contrary to the public policy of the state. *Mitchell's, Inc. v. Friedman,* 303 SW 2d 775, 779, (1957). While indemnity contracts are strictly construed against the indemnitee, and the liability of the indemnitor cannot be extended beyond the express terms of the contract, the Supreme Court of Texas has said that it is not necessary for the parties to say in so many words that they intend to protect the indemnitee against liability for negligence, it being sufficient if it clearly appears from the agreement that such was the intention of the parties. *Mitchell's Inc. v. Friedman,* supra. This same position was stated another way by that Court in the recent case of *Ohio Oil Co. v. Smith,* 365 SW 2d 621 (1963), wherein it was pointed out that "* * * * in owner-contractor situations, judicial construction of indemnity clauses to cover the indemnitee's negligence, notwithstanding absence of an express provision to that effect in the contract, has been said to be common."

This is not a new ruling. One of the earliest Texas Supreme Court cases dealing with this issue, *Houston & T. C. R. Co. v. Diamond Press Brick Co.,* 222 SW 204 (1920), involved a contract provision under which a brick company agreed to save a railroad "harmless from any and all claims for damages" arising out of the construction, operation and maintenance of a spur track leading to the brick company's plant. In rejecting the argument that there would be no indemnity against the railroad's own negligence, the Court stated:

"[T] his section would be inoperative and rendered meaningless if construed to exclude negligence, as a claim for damages against the railroad company growing out of any of these things could have no standing in a court unless predicated upon the negligence of the railroad company, or its servants. The section must, we think, be construed as contemplating claims for damages founded upon such negligence."

In the case of *Macon v. Warren Petroleum Co.*, 202 F. Supp. 194, 197, affirmed, 316 F. 2d 287, where a similar situation was presented, this Court, in holding that the deceased employee's injuries clearly arose in connection with his activities while performing the work of the indemnitor under its contract with the indemnitee said: "To require that there be a causal connection between their 'activities' and the thing that produced the injuries, would be to place a highly restricted meaning upon the term and to read into the agreement words that simply are not there. It is unnecessary to look beyond the express terms of the contract itself to see that the parties intended that Warren (the indemnitee) should be indemnified by Alamo (the indemnitor) for any loss sustained as a result of injuries to Alamo's employees, even though they resulted from Warren's own negligence."

A final point that is raised by the parties is in regard to the allowance of reasonable attorney's fees incurred with respect to the prosecution of this suit to recover on the contract of indemnity. Application is here made of the general rule that such fees cannot be recovered in the absence of an express provision therefor in the indemnity agreement. *Rublee v. Stevenson*, 161 SW 2d 528 (Tex. Civ. App. 1942). No such provision is found in the contract of indemnity, therefore, the Court must conclude that they are not allowable.

Judgment will accordingly be entered in conformity with the views hereinabove expressed.

Dated this 22nd day of April, 1968.

s/Adrian A. Spears

Adrian A. Spears
United States District Judge

APPENDIX F.

JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

W. R. GRIMSHAW COMPANY, Plaintiff VS. MARTIN WRIGHT ELECTRIC COMPANY, Defendant	CIVIL ACTION NO. 66-99-SA

JUDGMENT

This cause, after due notice to the parties came on to be heard on the 5th day of March, 1968, on the motion of plaintiff, W. R. Grimshaw Company, for summary judgment and upon the cross-motion of defendant, Martin Wright Electric Company, for summary judgment, all as authorized by Rule 56 of the Federal Rules of Civil Procedure, and the Court having heard counsel for plaintiff and defendant on their respective motions for summary judgment, and the Court having received and considered written briefs of both parties, and the Court having considered the pleadings, evidence, admissions, stipulations, and interrogatories on file herein, and having considered the facts found in the opinion of *W. R. Grimshaw Company vs. Zoller,* 396 S.W.2d, 477, is of the opinion and finds that there is no genuine issue as to any material fact in this cause, and that plaintiff's motion for summary judgment should be granted, and that plaintiff, W. R. Grimshaw Company, is entitled to a judgment against defendant as a matter of law, as hereinafter set out, and that plaintiff's prayer for

attorneys' fees for prosecuting this suit be and the same is hereby denied.

The Court is further of the opinion and finds that the cross-motion for summary judgment of defendant, Martin Wright Electric Company, should be and the same is hereby in all things denied.

The Court therefore finds that the plaintiff, W. R. Grimshaw Company, is entitled to recover of and from the defendant, Martin Wright Electric Company, the sum of $120,934.16, together with interest thereon at the rate of six percent (6%) per annum from April 28, 1966, until date of this judgment, such interest having accrued in the amount of $14,313.29, and that therefore, plaintiff, W. R. Grimshaw Company, is entitled to recover of and from the defendant, Martin Wright Electric Company, the total amount of $135,-247.45, plus interest and court costs.

It is therefore, ORDERED, ADJUDGED and DECREED by the Court that the plaintiff, W. R. Grimshaw Company, a corporation, do have and recover of and from the defendant, Martin Wright Electric Company, a corporation, the sum of One Hundred Thirty-five Thousand Two Hundred Forty-seven and 45/100 Dollars ($135,247.45), together with interest thereon from date hereof at the rate of six percent (6%) per annum until paid and for all costs of suit, for all of which let execution issue.

To which action of the Court defendant duly excepted.

SIGNED this 18th day of April, 1968.

s/Adrian A. Spears

Adrian A. Spears
United States District Judge

APPROVED AS TO FORM:

s/Alfred W. Offer

Alfred W. Offer
Attorney for Plaintiff,
W. R. Grimshaw Company

Attorney for Defendant,

Martin Wright Electric Company

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1228

W. R. GRIMSHAW COMPANY,
Petitioner,

VS.

MARTIN WRIGHT ELECTRIC COMPANY,
Respondent,

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI, TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1228

W. R. GRIMSHAW COMPANY,
Petitioner,

VS.

MARTIN WRIGHT ELECTRIC COMPANY,
Respondent,

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI, TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Nothing unusual is presented by the Petition for Writ of Certiorari in this case. The dispute is as to which of two corporations shall bear a loss which a jury has found was caused by Petitioner's negligence. The question presented is whether or not a subcontract by Respondent required it to indemnify Petitioner for the damages resulting from Petitioner's negligence. The Trial Court prior to the decision of the Texas Courts in *Brown & Root vs. Service Painting Co.*, 437 S. W. (2d) 330 held that there was indemnity. The Court of Appeals, relying almost wholly on the *Brown & Root* case, unanimously held that under the undisputed facts and under the subcontract there was no indemnity. The

only problem before the lower courts was as to the proper construction of the particular phraseology of the indemnity clause of the subcontract and its application to the unique facts involved and the Court of Appeals followed the most recent authoritative expression of the Supreme Court of Texas in *Brown & Root.*

REPLY TO FIRST QUESTION PRESENTED

Petitioner's First "Question Presented" is whether or not the Court of Appeals properly applied the Texas law as required by *Erie vs. Tomkins,* and the Rule of Decision Act, 28 U.S.C. 1653.

As pointed out on page 16 of the Petition of Writ of Certiorari this case was orally argued on December 4, 1968. At that time, the case of *Brown & Root vs. Service Painting Co.,* 437 S.W. (2d) 330 had not been decided. However, on February 20, 1969 this decision of the Beaumont Court of Civil Appeals of Texas was handed down and was promptly called to the attention of the Court of Appeals.

Thereafter, on April 8, 1969, Application for Writ of Error in *Brown & Root* was filed in the Supreme Court of Texas (12 Texas Supreme Court Journal, 318) and on May 8, 1969 the Supreme Court *"Refused"* the Application (12 Texas Supreme Court Journal, 374). Under Rule 483 of the *Texas Rules of Civil Procedure,* this action of the Supreme Court placed its stamp of approval not only upon the judgment of the Court of Civil Appeals but in effect adopted the opinion as its own. Consequently, when the Court of Appeals in the instant case handed down its opinion on October 16, 1969, the *Brown & Root* case was (and still is) the latest authoritative expression by the Supreme Court of Texas on the points involved in this case.[1]

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(1) On October 1, 1969, the Supreme Court of Texas in *Mercer vs. Hardy,* 444 S.W. (2d) 593, cited *Brown & Root* with approval, but held that in view of the fact that the operations which would bring into play the indemnity agreement had not yet begun, it was not necessary to construe the indemnity agreement.

Although Petitioner makes the bold statement that the indemnity agreement in *Brown & Root*, is "clearly dissimilar" to the indemnity agreement in the case at bar, Petitioner does not favor us with any discussion of wherein the agreements are "dissimilar". It is submitted then if there is any dissimilarity between the two indemnity agreements, the agreement in *Brown & Root* is even broader than the one here because in *Brown & Root* the indemnity was against injuries sustained "in connection with" the work. In *Macon vs. Warren Petroleum Corp.*, 202 F. Supp. 194, the Trial Judge, who decided this case, called the term "in connection with" the *magic words*, but they do not appear in the indemnity agreement in the instant case.

Being unable to differentiate between the indemnity agreements, Petitioner now says that the facts of the cases are distinguishable and on page 18 of its Petition says that "*Wright* (Respondent) * * * * *was required under such subcontract* * * * * *to furnish its own lighting* * * * * (and its) failure * * * * was the primary cause" of the injuries.

In the damage suit brought against Petitioner by the widow of the deceased employee, the jury found that Petitioner violated its duty to the deceased in several particulars, one of which was Petitioner's failure to furnish adequate lighting and the Court of Appeals held "No reason suggests itself for disagreeing with the jury in that case that the responsibility for the inadequate lighting in the basement area was (Petitioner's)."

We submit that the Court of Appeals was correct and nowhere in the contract can we find any requirement express or implied that any one other than Petitioner had any right—much less any duty — to install lighting not specified under the subcontract.

REPLY TO SECOND QUESTION PRESENTED

Petitioner's Second "Question Presented" is that the decision of the Court of Appeals in this case is contrary to and in conflict with its prior holdings.

A simple answer to this is SO WHAT! It would not be the first time that an appellate court changed its mind. Furthermore, the appellate court in this instance is obligated under *Erie vs. Tomkins* to follow the latest authoritative decision of the State Court in this diversity case and it would be the obligation of the Court of Appeals to follow *Brown & Root* even if it was in conflict with every decision theretofore handed down on the subject by such Court of Appeals.

However, it is submitted that the decision of the Court of Appeals here is clearly in accord with the many decisions of that Court beginning some twenty years before with *Foley vs. Employers Casualty Co.*, 158 F. (2d) 363 and both the facts and the indemnity agreements in the instant case can be differentiated from the cases which Petitioner says are in conflict.

REPLY TO THIRD QUESTION PRESENTED

Apparently Petitioner's Third "Question Presented" is to the effect that there is a fact question in the case now as to whose duty it was to furnish lighting at the time and place of the accident.

Petitioner was the first to file a motion for summary judgment here in which the position was necessarily taken that there was no fact issue in the case.

Respondent filed a cross-motion for summary judgment in effect agreeing that there was no fact issue in the case.

The Trial Judge granted respondent's motion for summary judgment – holding that there was no fact issue in the case.

In petitioner's brief in the Court of Appeals on page 12, Petitioner states:

> "FACTS ARE UNDISPUTED – NO FACT QUESTION INVOLVED"
>
> "The record in the case clearly shows that the material facts are undisputed."

On page 4 of the Petition for Writ of Certiorari herein Petitioner says:

> "There being no dispute as to the underlying facts both parties moved for summary judgment *****. The District Court concluded that there was no genuine issue as to any material fact ****."

Petitioner cannot now change the position it has taken throughout this litigation and the lower courts having found that there is no disputed issue of fact, this Court should not undertake to review such finding in the absence of a very obvious and exceptional showing of error. *Graven Tank & Mfg. Co. vs. Linde Air Products Co.*, 336 U.S. 271, 69 S. Ct. 535 (1949).

It is respectfully submitted that the Petition for Writ of Certiorari is without merit and should therefore be denied.

Respectfully submitted

JOSH H. GROCE
JACK HEBDON

BY_____
Josh H. Groce

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